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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 E.I. DU PONT DE NEMOURS AND
4 COMPANY,

Plaintiff,

5 v.

12 MC 120-P1

6 KOLON INDUSTRIES, INC.,
7 et al.,

8 Defendants.

9 -----x

10 June 12, 2012

11 10:20 a.m.

12 Before:

13 HON. JOHN G. KOELTL,

14 District Judge

15 APPEARANCES

16 KOBRE & KIM

17 Attorneys for Plaintiff

18 BY: MICHAEL SANGYUN KIM

MARCUS GREEN

19 PAUL HASTINGS, LLP

20 Attorneys for Defendant Kolon Industries

21 BY: GLENN D. DASSOFF

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STEPHEN ARENA

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(In open court)

THE DEPUTY CLERK: Du Pont vs. Kolon. All parties please state who they are for the record.

MR. KIM: Good morning, your Honor. Michael Kim and Marcus Green, Kobre & Kim for Du Pont.

THE COURT: Good morning.

MR. DASSOFF: Good morning, your Honor. Glenn Dassofoff for Paul Hastings, LLP, specially appearing for Kolon Industries, Inc. And with me, my colleague, also specially appearing, Abigail Lloyd.

MR. TRACHTENBERG: Good morning, your Honor. David Trachtenberg, Trachtenberg, Rodes & Friedberg, and Stephen Arena for Shinhan Bank and Shinhan Financial.

THE COURT: Good morning, all. Good to see you all.

I should point out, it occurred to me that I have a friend who worked at Du Pont's counsel's office in Delaware. I believe he's retired now. Nothing about that affects anything that I do in the cases.

All right. There are three motions pending before me today. There is the turnover motion against Kolon. There is the status quo motion against Kolon. And there's the motion to compel compliance from Shinhan.

I'm familiar with the papers. I'm prepared to listen to argument. Mr. Kim?

MR. KIM: Thank you, your Honor.

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1 Your Honor, I was giving thought, in preparation for
2 addressing the Court, as to what areas I think the parties
3 could have done a better job briefing that I could address
4 orally that might be of assistance to the Court in rendering
5 its decision. So I thought that I would focus most of the
6 discussion on the agency branch of the personal jurisdiction
7 cases, and in particular, how factually, if one were to apply
8 it to this case, the picture looks, and in particular with
9 reference to the very particular affidavits submitted by Kolon.
10 And I wanted to discuss with your Honor, explain to your Honor
11 why we have -- on the basis of the record there is sufficient
12 basis for the Court to find personal jurisdiction over Kolon
13 Industries/Kolon Corp., or at the very least, order
14 jurisdictional discovery, as would be Du Pont's right on the
15 present record.

16 I want to just focus on that, and then there are, I
17 think, various other, I think, less involved issues that I'd
18 like to move on to. But if your Honor prefers a different
19 order or has an area you really want to talk about now, you're
20 the one making the decision so I will conform myself.

21 THE COURT: That's fine. I always want to hear what
22 counsel has to say.

23 My concern, which I raised with you last time and
24 really hasn't abated -- in fact, it's increased, as I look at
25 the papers and contemplate the papers against three additional

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1 banks and the additional motion against Kolon to, quote,
2 maintain the status quo -- I ask myself, why is this here? I
3 can understand assets in New York. You have a judgment and
4 you're trying to enforce the judgment. And if you have an
5 uncooperative defendant, huge as it is, you go looking for
6 assets wherever they can be found and you pursue those assets.
7 And so if there are assets in New York, you pursue the assets
8 in New York. Okay.

9 The remarkable thing about this case is you have this
10 huge defendant with over a billion dollars worth of worldwide
11 revenue a year, turns over revenue at an enormous pace, very
12 large company. You have personal jurisdiction over that
13 company in Virginia. You've gotten some very favorable rulings
14 from the judge in Virginia, including keeping track of assets,
15 watching dispositions of amounts in excess of \$250,000, details
16 about all of the bank accounts in Korea. No assets pointed out
17 to me in New York. And yet there is a multiplicity of motions
18 being made to the Court in New York, including some that are,
19 you know, really out there, like the motion to compel Kolon to
20 maintain the status quo where there, at the very least, is a
21 question about personal jurisdiction.

22 So you come to a court in New York and say, well, we
23 maintain that we have personal jurisdiction and maintain --
24 tell Kolon to maintain the status quo. What does that add, one
25 would ask, to what you can reasonably get or have gotten from

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1 the judge in Virginia, who plainly has personal jurisdiction
2 over Kolon in Virginia? Would Kolon listen to me more than to
3 the judge in Virginia? Are you going to make, you know --
4 plainly, you are -- a series of continuing motions to the Court
5 in New York when you got the defendant in Virginia?

6 And I raised this last time. It has the aspect of
7 multiplying the proceedings without a good basis. As I said,
8 if there were assets in New York that you wanted to seize in
9 New York, that's one thing. To come to New York as simply a
10 second front in the battle against Kolon and to try and
11 establish personal jurisdiction over Kolon, and then to use
12 that to get the same relief that you could get against Kolon in
13 Virginia, one would ask, why? I realize that the amount
14 involved in the judgment is huge, but that doesn't justify huge
15 legal fees and multiplying the legal fees.

16 There is a footnote in Kolon's brief that says, you
17 know, Judge, you could simply state all of this and await for
18 the applications to be made in Virginia. I haven't done that,
19 and I wouldn't do it without briefing. But that has a certain
20 appeal.

21 One would ask, why New York? Why not California? Why
22 not Texas? What's the about basis for bringing what is now,
23 today, three motions before me and three more in the wings
24 against other banks and who knows what else?

25 So that's a preliminary observation. And, again, I

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1 don't want to throw you off from the argument that you wanted
2 to make. It is a concern.

3 MR. KIM: No, I appreciate that, Judge. And I'd like
4 to sort of address that head on first, before we move to the
5 personal jurisdiction points, if I may.

6 THE COURT: Sure.

7 MR. KIM: Your Honor, I think in fairness, the various
8 bank motions that we have brought, we think we explained a bit
9 last time, but I really need to clarify that we are not just
10 trying to multiply motions on the Court's calendar. The fact
11 is that we had suggested that those motions, the restraints and
12 the banks being on notice, were necessary, but that the Court
13 put them aside so that neither the banks nor Du Pont would have
14 to expend legal fees, and the Court wouldn't have to expend its
15 time pending adjudication of the Kolon motion.

16 Now, I think it's immensely important to sort of
17 contextualize why we're doing what we're doing. What we are
18 trying to do in New York may really make the difference between
19 this judgment debtor, who's really been the victim of a crime
20 in getting adequately compensated in any reasonable period of
21 time or not.

22 First, with respect to your Honor's questions about
23 the banks, why move against the banks? Why not just do a
24 proceeding in Virginia against Kolon? Well, the fact is,
25 Judge, that Kolon has a big portion of its assets, cash in

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1 these banks. And obviously for a judgment creditor that's the
2 most feasible thing to try to seize. Not a whole lot you can
3 do with a factory that's in rural Korea. I'm not sure if I
4 could disassemble, bring it over here and give it to Du Pont.
5 So the cash obviously is a very important component.

6 THE COURT: A garnishment order, that, you could get.
7 The company has huge revenues which it turns over.

8 MR. KIM: Yes, your Honor. And we are moving against
9 customers, but I think with respect to the cash, I think it is
10 reasonable obviously for a judgment creditor to be focused on
11 the loose cash that the debtor has. Now --

12 THE COURT: And if you have personal jurisdiction,
13 which you do, over Kolon in Virginia, why could not the judge
14 in Virginia be asked to require Kolon to turn over money that
15 it has control of in banks? Exactly what you're asking me to
16 do.

17 MR. KIM: Correct, it could, but I think there are a
18 couple of things I'd like to really clarify there.

19 First of all, with respect to the banks, it's a fact
20 that Kolon has sent reports of what it supposedly has in these
21 banks and yet has consistently refused to allow those banks to
22 confirm or verify any of it. I think even that fact alone
23 should be worrisome and is worrisome.

24 THE COURT: But you're not answering the question.
25 Why not ask the judge in Virginia to require Kolon to turn over

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1 money that it has in banks? The judge has already required
2 Kolon to tell you what banks, what accounts, how much money.
3 You've determined what the accounts are, what the numbers are.
4 You've determined that there's over \$70 million in banks in
5 Korea, and you have a judgment debtor before the Court in
6 Virginia. Have you even asked?

7 MR. KIM: No. We have moved here for a turnover
8 order, Judge.

9 THE COURT: Why?

10 MR. KIM: Well, a few different reasons, Judge.

11 First, because the statute explicitly permits us to do
12 so. This is different from a forum shopping argument
13 prefiling, where judges can legitimately ask, isn't this case
14 better litigated elsewhere, based on convenience of witnesses,
15 knowledge of the judge, etc? And a federal statute explicitly
16 allows the judgment creditor to register the judgment in other
17 jurisdictions. And if there is personal jurisdiction or other
18 in rem jurisdiction, etc., it is completely legitimate for
19 different districts to be involved in judgment --

20 THE COURT: I know, I know, but I would suspect that
21 the legislative history of that statute would indicate that you
22 register judgments in different jurisdictions so that you can
23 get assets in those jurisdictions easily. It's not for the
24 purpose of getting jurisdiction over the -- or pursuing the
25 judgment debtor, whom you're pursuing in the district where you

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1 have a judgment.

2 And it's not the case where, as in *Gucci*, which you
3 like to cite to me, there is a default judgment. And so you've
4 got a -- you know, you've got a fly-by-night debtor who's never
5 appeared, and you have to go to districts to try and enforce a
6 judgment.

7 Here you have an established company, personal
8 jurisdiction and, you know, of course, I understand the
9 argument, we've made the motion because we could and the
10 statute allows us to do it. We've registered. We're pursuing
11 it, and we're here because the statute gives us the right to be
12 here.

13 And the corollary to that is, Judge, we have a right
14 to make the motion, and it's your duty to decide it.

15 MR. KIM: And you have the right to deny it,
16 obviously.

17 THE COURT: And I understand that.

18 MR. KIM: Let me try to persuade you, because I
19 understand where your Honor is coming from. And if I were in
20 your shoes, obviously, if I felt that -- you know, we are
21 working through a lot for personal jurisdiction, I understand
22 that. Your Honor spends a lot of time on it. Counsel spends a
23 lot of time on it. And it is a legitimate question, why are we
24 doing this in New York and not Virginia, okay?

25 First of all, the Virginia --

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1 THE COURT: Because --

2 MR. KIM: Go ahead, Judge.

3 THE COURT: -- you have the preliminary question in
4 New York whether there's personal jurisdiction.

5 MR. KIM: Correct.

6 THE COURT: The question -- which doesn't exist in
7 Virginia. So you have to move through all of these
8 preliminaries in New York to get to the point where you are in
9 Virginia.

10 And the one question which I -- you know, I've asked
11 you last time, I pondered the answer and I still don't
12 understand the answer, why not seek the relief in Virginia? I
13 mean --

14 MR. KIM: I'm going to give you that answer.

15 THE COURT: Great.

16 MR. KIM: So, first of all, the Virginia court does
17 not have jurisdiction over the banks, as far as I can tell. We
18 are --

19 THE COURT: Okay. But we're talking about why is --
20 you've told me, put the bank stuff on hold. Let's get to
21 Kolon, and you can decide the issues with respect to Kolon.
22 And once you've decided the issues with respect to Kolon, then
23 you can begin to make orders against Kolon and everything will
24 be fine.

25 My question is: Why not ask for that relief in

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1 Virginia, where you don't have to go through all the
2 preliminaries to say, let's get jurisdiction over Kolon? And
3 to give you a window, I think you've made some showing with
4 respect to jurisdiction in New York, but I don't think that
5 it's sufficient. So you will have jurisdictional discovery
6 with respect to Kolon in New York, jurisdictional discovery.
7 I'll give you 60 days to do jurisdictional discovery to
8 establish that Kolon is present in New York. So 60 days hence,
9 in New York, you will be at the point where you are in
10 Virginia. And for some reason, which you still haven't told me
11 but you promised to tell me --

12 MR. KIM: I promise.

13 THE COURT: -- why you want to ask the judge in
14 New York rather than the judge in Virginia, or indeed, ask them
15 both. But if you ask the judge in Virginia, then the judge in
16 New York may well say, well, wait a moment, you already asked
17 the judge in Virginia.

18 MR. KIM: I don't like to ask two judges for the same
19 thing. I think at least one of them thinks their time is being
20 wasted. But --

21 THE COURT: That's all we do, by the way. Never rely
22 on an argument of time with respect to me, because we have all
23 of the time in the world. All we do is to decide cases; if not
24 yours, someone else's. So ...

25 MR. KIM: Well, as I mentioned a few minutes ago, I

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1 think whether this case is in New York or Virginia might very
2 well make the difference between whether this judgment creditor
3 gets compensated in a reasonable period of time or not. And
4 the simple fact is, Judge, just to be very straight with you,
5 Virginia law is very undeveloped in this area as to foreign
6 assets owned by a foreign judgment debtor. I believe that the
7 face of the Virginia turnover statute -- because, as your Honor
8 knows, federal courts borrow or import debtor creditor laws of
9 the state in which the district sits. I believe Virginia have
10 a turnover statute, should afford a similar remedy.

11 But as your Honor knows, because of New York being
12 what it is and the center of a lot of international commerce, a
13 number of very complicated issues that can arise with respect
14 to various assets that are overseas and whether a foreign
15 judgment debtor can be ordered by a US District Court to give
16 up those foreign assets have been litigated extensively in the
17 Second Circuit and in New York State and all been answered
18 conclusively, such that a jurist sitting in New York, whether
19 it's your Honor or another Part I judge on a number of issues I
20 know Kolon's able lawyers will bring up over the next few
21 months, really simply need only look at the case law and will
22 have ready answers to a majority, if not all of the questions
23 that will arise.

24 What will happen in Virginia if I were to have applied
25 there first, we have a capable judge there. Obviously I would

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1 get a full and fair hearing. But what would happen is that,
2 number one, we would get into a long and protracted debate over
3 Virginia law in this area with respect to foreign debtor with
4 foreign assets.

5 And then secondly, there are literally scores of other
6 issues with respect to particular assets, the reach of the
7 Court's power, etc., that New York itself spent really the last
8 few decades working its way through that are not answered in
9 Virginia.

10 Now, I'm going to advocate my positions there, if
11 that's where your Honor ultimately sends me; I hope not. And
12 by the time I'm done, we may or may not have a just result for
13 the judgment creditor here. And that's why I'm doing it; not
14 because I'm a New York lawyer and I wanted something to do.
15 I've got plenty of things to do. I could do it in Virginia or
16 here, but I really thought for the fair adjudication of a
17 judgment creditor who's faced with a judgment debtor that is
18 really doing the following, by their own admission, the bond,
19 the appellate bond costs 40-something million dollars a year.
20 By their own admission, even the self-reported figures, they
21 have transferred \$500 million over the last several months.
22 They can afford to bond this judgment, yet they have not. They
23 can afford to pay part of this judgment, yet they have not.
24 They purport to give asset disclosures but consistently refuse
25 to allow any third party to verify them.

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1 And of course your Honor is familiar with the original
2 facts that led to the judgment. This is not a simple
3 commercial dispute. There is a heavy enough section with
4 criminal activity here.

5 So that's the primary reason that I brought this in
6 New York, because I thought without New York law, we may really
7 very well have a situation where you may have a number of well
8 intentioned judges presiding over this, but because of the
9 context of Virginia law and other issues, we may just be mired
10 over the next several months in arguing out issues that are
11 quickly resolved here.

12 And secondly, since the Virginia court doesn't have
13 jurisdiction over the banks, if Kolon essentially refuses to
14 give these irrevocable instructions to the banks, as it
15 basically is telling the Court it would be some kind of Korean
16 crime for them to do so, because I think that's a pretty good
17 indication that they don't have a desire or a plan to comply
18 with a US District Court order with respect to these
19 instructions -- I don't understand it either, Judge. That's
20 just what they said.

21 THE COURT: Because I hadn't read any of the papers
22 before me to suggest that a customer of a bank could not order
23 a bank to turn over records, turn over --

24 MR. KIM: I agree. It doesn't comport with common
25 sense for Kolon to suggest that it would be some type of

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1 violation of Korean law for a customer to basically disclose
2 his own assets to third parties.

3 But be that as it may, I think the -- the situation we
4 would have down in Virginia, not only the problems with --
5 against the judgment debtor, but because we don't have
6 jurisdiction over any of the banks, when Kolon -- not if, when
7 Kolon does not issue these instructions, there will have been
8 many months. And we'll have nothing actually restraining the
9 banks, no actual legal action against the banks, which is also
10 an untenable situation.

11 So I knew we have to have something against the banks.
12 And so I was choosing between having a Virginia turnover
13 application and the perilous set of New York bank applications
14 all before two judges somehow trying to coordinate the two or
15 having the New York -- where I believe there is personal
16 jurisdiction, or there will be, unless your Honor sees the
17 discovery hopefully -- having a New York judge preside over all
18 the bank applications and a New York turnover application, such
19 that if the New York judge deems it appropriate, the bank
20 applications can be put on hold with the banks, obviously on
21 legal notice of what's happening. And then if there is a
22 turnover order against Kolon, the bank applications fall away.

23 But if Kolon does not comply with the Court's orders,
24 as it very well might not, the bank applications have to be
25 pursued anyway.

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1 So ultimately I thought for these two reasons --
2 first, New York law itself doing justice here; and secondly,
3 the fact that the banks have to be involved anyway -- that this
4 was really, in fact, the most efficient thing for my client,
5 and really the system.

6 THE COURT: Are you so unsatisfied with the available
7 remedies in Korea?

8 MR. KIM: Yes. If you assume we're a profit
9 maximizing rational actor, based on all the information we've
10 received, we do not believe it's a pragmatic solution at this
11 point. And I think a US District Court judgment now really has
12 to be enforced in the US courts, or at least elsewhere outside
13 of Korea. And that's why we're doing what we're doing.

14 So I hope that answers your Honor's question about why
15 I filed all this paper and why we're doing it this way. I
16 think it will make a big difference at the end of the day where
17 we are.

18 THE COURT: It's hard -- okay. I mean, I accept
19 plainly what you say. It's hard to believe that it is an open
20 question in other jurisdictions, whether if you have personal
21 jurisdiction over a debtor you can order the debtor to comply
22 with the orders of the Court.

23 MR. KIM: I'm with you, Judge. I feel that way, but
24 there are a number of -- New York itself took a long time to
25 work through that question, partly because of foreign

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1 exemptions. There are foreign debtor creditor laws that
2 purport to give certain types of exemptions on their
3 applicability when a debtor here is being ordered to give up
4 foreign assets. That's been one big area of a lot of judicial
5 sort of contemplation.

6 There are various other areas that come up, but I
7 agree with your Honor, if a party is before the Court and
8 subject to the Court's jurisdiction, the Court really should be
9 able to tell that party to do anything, including bring assets
10 from the other side of the planet here. But that issue itself
11 is an issue of legislative construction on that particular
12 turnover statute.

13 THE COURT: All right. I understand. *Koehler* itself
14 was four to three on the power of the Court to order production
15 of assets outside of New York.

16 MR. KIM: That's right. And I think the problem here,
17 Judge, is that the power, the turnover power against the debtor
18 is a creature of state statute and not the common law. So your
19 Honor would be, I'd say, unqualifiedly mathematically correct,
20 if we're just talking about a court's inherent equitable power
21 for a person before it. I think the complication becomes when
22 these legislature enact these turnover laws, each with a
23 slightly different wording. Then the judges have to construct
24 whether the legislature wanted different result. And that is
25 really what causes the complication in this area of the law,

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1 which New York has worked, really worked decades to work
2 through and really answer virtually almost every question that
3 one could raise in this pretty complicated area.

4 THE COURT: All right.

5 MR. KIM: So ultimately I submit it will save the
6 Court a lot more time once we're past the personal jurisdiction
7 point to adjudicate this dispute.

8 Now, I had planned a whole discussion about personal
9 jurisdiction and why you should give me discovery, but I'm
10 going to skip that because one of the first things I was taught
11 at the US Attorney's Office when I first learned how to do it
12 is to move on from anything that you decided. And I wanted
13 to --

14 THE COURT: If it's decided in your favor.

15 MR. KIM: Correct, Judge. So I think with respect to
16 the other issues, if your Honor wants to hear something about
17 the Hague Convention --

18 THE COURT: About what?

19 MR. KIM: About the Hague Convention issue. Obviously
20 from your Honor's jurisdictional and discovery decision, I
21 think we've -- that issue is necessarily resolved in our favor.

22 THE COURT: I'm not impressed by the argument under
23 the Hague Convention any more than I was impressed by your
24 initial argument that Kolon's -- what I'll call special
25 appearance to resist the order against Shinhan Bank subjected

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1 them to general personal jurisdiction.

2 MR. KIM: I agree that I should have been more
3 specific and you shouldn't have -- you should not have been
4 impressed by that branch of the argument. But there is
5 actually a little bit more there.

6 THE COURT: It was an argument that really shouldn't
7 have been made only to be abandoned in reply.

8 MR. KIM: Well, actually, I wasn't going to abandon
9 the argument wholesale.

10 Here's the part that you may be -- is a real issue
11 sort of within that bracket, which is I agree that the filing
12 of the brief in the bank turnover proceeding itself does not
13 trigger wholesale general in personam jurisdiction, which would
14 expose Kolon to kind of, you know, any kind of liability or any
15 kind of order that the Court with want to fashion.

16 However, as your Honor knows, the Federal Rules of
17 Civil Procedure, when they were enacted, did not explicitly,
18 did not provide for a special appearance. 4(e) explicitly
19 actually just does not happen. So the cases that talk about
20 what happens if you, quote/unquote, specially appear in a
21 federal case, borrow from the quasi in rem case law for the
22 state in which that district sits.

23 And here, while I agree with your Honor that the mere
24 fact that Kolon filed a brief in the Shinhan proceeding itself
25 should not trigger automatic in personam jurisdiction

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1 generally, what I would submit is by the same quasi in rem
2 principles in the cases Kolon has cited, that if the Court were
3 to fashion an order adjudicating Kolon's rights and obligations
4 with respect to the property at issue in those proceedings,
5 i.e. Kolon being ordered to do things with those bank accounts,
6 that actually would be an appropriate exercise in personal
7 jurisdiction under *International Shoe* principles; because, as
8 your Honor knows, when a party comes in even objecting to
9 personal jurisdiction, what happens is when the Court
10 adjudicates various issues, even with respect to that special
11 appearance in the quasi in rem proceeding, they're bound by it.
12 They can't later collaterally attack it.

13 So when a party is coming in under the quasi in rem
14 case law to say that, I believe that XYZ should be done with
15 the property instead, the Court can adjudicate that narrow set
16 of issues and bind the party to it.

17 Now, what I would suggest your Honor is that while
18 your Honor is correct that Kolon should not be subject to just
19 endless in personam jurisdiction generally as a result of their
20 having injected themselves into the bank turnover proceeding, I
21 would submit that they have subjected themselves to the Court's
22 power in terms of the Court issuing interim relief with respect
23 to the bank accounts themselves; in other words, what Kolon
24 should do with the bank accounts, instructions issued to the
25 banks, disclosure in the banks and so forth.

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1 And I think that comports with the very principles of
2 the quasi in rem case law that this Court would borrow from
3 New York State case law, which is when the party comes in and
4 says, I want to participate in the adjudication of this piece
5 of property, they are subjecting themselves to the Court's
6 jurisdiction insofar as that property goes.

7 THE COURT: Okay. Go ahead.

8 MR. KIM: So, your Honor, I think that really leads to
9 the injunction against Kolon. I suppose the Court could be
10 thinking of it one of two ways. If you're ordering
11 jurisdictional discovery, you might be thinking that you want
12 the jurisdiction at discovery complete first before you take up
13 the interim injunction to preserve assets. That's one
14 approach, obviously.

15 THE COURT: It's a prerequisite. I wouldn't have the
16 right to issue such a new order if I had no personal
17 jurisdiction over Kolon. The law says there's no personal
18 jurisdiction. It's a matter which is certainly disputed.

19 MR. KIM: What I would suggest, your Honor, is that
20 your Honor does have the power and should issue the interim
21 order, even while the personal jurisdiction is taking place
22 with respect --

23 THE COURT: By the way, your turnover order that you
24 request wasn't limited to, for example, the Shinhan Bank
25 account in which there was a special appearance. It's all --

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1 essentially all --

2 MR. KIM: The turnover order against Kolon is premised
3 upon -- I believe there's both personal and general
4 jurisdiction otherwise.

5 THE COURT: Yeah. So the argument of sort of general
6 personal jurisdiction based upon their appearance being the
7 equivalent of a motion to intervene, I mean, it was just wrong.

8 MR. KIM: I think with respect to the bank accounts
9 it's right. I think with respect to the injunction on the bank
10 accounts, which are the very property that's the subject of the
11 quasi in rem proceedings, as Kolon calls them, I think it's
12 right.

13 THE COURT: Okay. Go ahead.

14 MR. KIM: So what I'm suggesting, your Honor, with
15 respect to the bank accounts, the injunction, is that while
16 your Honor -- while I understand what your Honor is saying is
17 that to just issue a blanket order against Kolon generally
18 would require a finding of in personam jurisdiction, that could
19 only follow an analysis after jurisdictional discovery.

20 With respect to the bank accounts themselves, what I
21 would suggest is that your Honor issue the injunction that we
22 request or some variation thereof to preserve the bank accounts
23 and to give instructions for disclosure to the banks. Because
24 I think that would actually be narrowly tailored to hit
25 precisely the subject, the res, essentially, of the proceeding

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1 in which they brought themselves in.

2 THE COURT: Okay. Anything else?

3 MR. KIM: So there arises sort of the practical
4 question of what to do with the bank disclosure application
5 against Shinhan, and that there are others obviously in the
6 pipeline.

7 It seems to me, Judge, that the set of questions there
8 are very much intertwined in one important aspect with the
9 question of whether Kolon, A, will be ordered to turn over the
10 information in the banks, in other words, to give these
11 instructions to the banks; and B, whether it will comply.

12 In the following sense that if Kolon let's say doesn't
13 comply and doesn't issue these instructions, then I think
14 Du Pont would be able to say to the Court that there really is
15 no other way we're going to get this information. Shinhan Bank
16 is the only possessor of this information, since Kolon refuses
17 to give it up.

18 THE COURT: I don't understand why the information
19 that you're seeking from Shinhan is different from the
20 information that the judge has required to be provided to you
21 in Virginia.

22 MR. KIM: It shouldn't be, but the difference is it
23 comes from a third party that is verifiable. I think that's
24 the reason that all these judgment enforcement discovery
25 devices allow us to get information from banks; because when

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1 the debtor says these are all the people I've transferred it
2 to, this is all the money I have, we should be able to just get
3 a bank to tell us that's true.

4 THE COURT: Has the judge in Virginia required that
5 you be given bank statements as opposed to simply the report of
6 the debtor?

7 MR. KIM: He has not required it. Kolon has provided
8 summaries of what it has in its banks and its bank activity,
9 but not the actual -- whatever they might make and say it's
10 bank statements.

11 Judge, I also want you to understand the context,
12 because it does seem ridiculous if I'm saying IBM sent me a
13 document, I'm not sure if it's true, but that's not what we
14 have here. We actually have a 90-page spoliation evidence
15 opinion, because these people were basically destroying
16 documents and making things up.

17 THE COURT: Sure, but there are -- yes. I mean, I
18 understand about fraudulent statements. But one would think
19 that if there was a question whether the statements in the
20 accounts are true, the judge who ordered that you be given the
21 accounts, if you have reason to believe that the information is
22 not accurate, would follow up with such things as copies of the
23 bank statements, yes. Can they be doctored? Yes. But, you
24 know --

25 MR. KIM: But I don't know how I would ever be able to

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1 tell that a bank statement or a self-reporting of a bank
2 transfer would be inaccurate, other than comparing it against
3 the extra records from the bank.

4 THE COURT: It would really be foolhardy, wouldn't it,
5 with a judgment of over \$900 million which is not going away
6 unless it goes away on appeal, to be producing fraudulent bank
7 statements? It's not as though Du Pont is going away.

8 MR. KIM: No more foolhardy than actually engaging in
9 a criminal conspiracy to steal the trade secrets in the first
10 place, which they have done.

11 THE COURT: Okay.

12 MR. KIM: Or to doctor and make up documents, which
13 they have done in front of a federal judge.

14 So I think, Judge -- I just want you to know, I mean,
15 I might sound paranoid if I say I want to verify it with the
16 banks, but that's what I'm trying to do.

17 THE COURT: Okay.

18 MR. KIM: I think there's no other practical solution.

19 So I think practically, what do we do with these bank
20 disclosure applications? It seems to me even if you deny it
21 and say Shinhan is sort of, you know, under all this Korean law
22 pressured, therefore it's not appropriate to put them in this
23 awkward position, if and when Kolon refuses to give these
24 instructions to Shinhan to, you know, disclose information,
25 etc., we'll just be back here basically saying, now the

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1 balancing of the factors are such that we have no other
2 recourse except to get it from Shinhan; whereas right now we
3 can't say that because the Kolon matter has not been fully
4 adjudicated.

5 So it seems to me the only practical thing to do with
6 these turnover applications is we could do it twice -- I'm
7 sorry, the disclosure applications in the banks, we could do it
8 twice and have another set of applications when Kolon refuses
9 to give these instructions, or we could have these bank
10 disclosures adjudicated after the Kolon disclosure order of the
11 injunction is adjudicated and Kolon refuses to comply, at which
12 point then it would become fully ripe and adjudicated once.

13 THE COURT: Sufficient unto the day, you know, I have
14 an application before me, and I'll decide it based upon what's
15 before me now, all of them.

16 MR. KIM: So I think on the --

17 THE COURT: I think you should finish up, because I
18 really have to listen to the other parties before I decide.
19 And --

20 MR. KIM: I think my time is better used in addressing
21 any new points they bring up now.

22 THE COURT: Okay.

23 MR. DASSOFF: Good morning, your Honor.

24 THE COURT: Good morning.

25 MR. DASSOFF: I'm going try to keep my comments brief.

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1 There are three issues I want to talk about. The
2 first one is to talk about the circumstances under which Kolon
3 specially appeared in the Shinhan preliminary injunction
4 hearing. And you need to put that in context to really
5 understand what happened.

6 Du Pont has conducted extensive discovery in Virginia.
7 It has the right to do so post judgment. It has asked for
8 extensive financial documents. We have produced, I've been
9 told, over 7,000 pages of those documents, most, if not all, in
10 Korean. Whether they include the bank statements or not, I'm
11 not sure. It would be easy for me to find out, but I believe
12 they do. If they don't, they can ask for them.

13 So the notion that somehow we're not being honest or
14 that we need a second look to confirm the accuracy of what's
15 being certified under oath by an officer of Kolon to Du Pont on
16 an almost daily basis under the order in Virginia, I think, is
17 a bit misleading.

18 The circumstances of their action against Shinhan here
19 are interesting.

20 THE COURT: Could I just pause for a moment.

21 One of the things I do this morning when I'm on Part I
22 is I do attorney admissions. Knowing the motions I have on
23 this morning, which is also part of Part I, I sense that there
24 are people in the courtroom who are here for attorney
25 admissions, not just for the motions.

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1 It's not necessary to stand, by the way. You're
2 welcome to take seats in the jury box. And when I'm told by my
3 deputy that everyone is here for attorney admissions, we'll
4 break in the argument on the motions and do the attorney
5 admissions.

6 Go ahead.

7 MR. DASSOFF: Thank you, your Honor.

8 So Du Pont went in ex parte and, I mean, really
9 ex parte. I've practiced for 31 years. I think I've only seen
10 this done two or three times. I've never done it myself. They
11 gave no notice to Kolon. They gave no notice to Shinhan when
12 they went into court. We take issue with and believe that they
13 exaggerated and, in fact, other facts, we think, are just plain
14 false. But when they made their motion for the temporary
15 restraining order in front of Judge Stein, he granted that
16 motion.

17 Shinhan had all of six days, calendar days, to file
18 its opposition. By the time we found out about that motion and
19 the order, that relief that Judge Stein had granted, I believe
20 we had two or three business days to respond. It was clear to
21 us that Shinhan had not engaged counsel. We didn't even know
22 if they would file opposition. As it turns out, their
23 opposition consisted of about a two- or two-and-a-half page
24 letter to the Court asking for additional time. We had no idea
25 whether the Court was going to grant that additional time. We

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1 didn't see that letter until we had already prepared and filed
2 with the Court our motion, or our opposition.

3 So those were the circumstances. We made clear to
4 this court in every appearance, telephonically and in person,
5 in our applications to appear pro hac vice, in our briefs, in
6 every single situation that it was a limited appearance and
7 that we were not submitting the jurisdiction.

8 We disagree about a lot of issues in this case, your
9 Honor. We do. But interesting, there are some issues we don't
10 disagree about, and I think they're important ones. We don't
11 disagree that to find general jurisdiction here in New York,
12 under Section 301, there has to be continuous, systematic and
13 substantial contact. And I think on the evidence before you,
14 it's clear there isn't.

15 Were this Court to find general jurisdiction over
16 Kolon in New York, here's what it would mean: It would mean
17 that any plaintiff anywhere in this country, and I would argue
18 in the world, can come to New York and sue Kolon for acts that
19 occurred outside of New York; anywhere in the world, if you
20 find Kolon is subject to general jurisdiction here in New York.

21 So what was Du Pont's proof in its motion of general
22 jurisdiction or specific jurisdiction? Three things, they
23 argue. And this is from Mr. Kim's declaration that was
24 attached to their motion.

25 The first was that Kolon USA is a subsidiary of Kolon

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1 located in New Jersey through which Kolon markets and sells its
2 products in the US, and upon information and belief --

3 THE COURT: I told Mr. Kim I'm inclined to believe
4 that there is an insufficient showing of jurisdiction over
5 Kolon, general jurisdiction or specific jurisdiction, but I'm
6 inclined to allow discovery. There is some evidence of
7 activity in New York.

8 There are the existence of the subs. Whether they
9 rise to the level of sufficient agency is something that I
10 certainly couldn't find in favor of Kolon at this point. It is
11 odd that a company the size of Kolon with the subs in New York,
12 you know, was not doing business in New York. But I certainly
13 couldn't find that. On the other hand, I would be inclined to
14 allow the discovery to go forward to see where the facts indeed
15 lie with respect to that.

16 MR. DASSOFF: And, your Honor, I understand that. I
17 understand the Court's comments. I respect them. I understand
18 you're trying to do the right thing. On the other hand --

19 THE COURT: The right thing is not something out there
20 in the cloud. The issue is whether on the facts and the law,
21 what is the more correct result? And there is plain case law
22 with respect to the preliminary showing with respect to
23 jurisdiction. I don't sit here as some arbiter attempting to
24 do the, quote, right, unquote, thing. I simply go through the
25 papers and attempt to decide the issues that come before me in

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1 the most correct way on the facts of the law. And, you know,
2 I'm here to follow the law. I don't just attempt to sit and do
3 what I think is, quote, the right thing.

4 MR. DASSOFF: I meant right procedurally; in other
5 words, giving Du Pont an opportunity, what I will characterize
6 as a second bite at the apple.

7 There are two cases that we've cited, the R-request vs.
8 Kimberly Carse case and the Stutz case, where the same exact
9 posture that our case is in, the courts found they hadn't
10 presented a prima facie, let alone a substantial case.

11 And Du Pont had every opportunity. This isn't a case
12 where they just got a judgment and they showed up the next week
13 in court in New York. They've taken extensive discovery in
14 Virginia post judgment on Kolon's assets so that they should
15 have been fully armed when they came in here. They've made no
16 showing at all to this Court that there's personal jurisdiction
17 over Kolon here. I don't think they get another chance. There
18 are no offices, never have been, for Kolon Industries in
19 New York. It has no officers, no employees in New York. Never
20 has. It's never registered to do business. It has no license.
21 It has no post office box. It has no phone number. If you
22 look up directory assistance or a phone book, you're not going
23 to find its name. It has no contact with New York, and that's
24 been true forever.

25 So they knew all those things. And what they gave you

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1 was a declaration based on information and belief, in two
2 cases, and the third where they tried to argue for specific
3 jurisdiction was the citation to an allegation, conclusory
4 allegation in the complaint. That's all the evidence they gave
5 you.

6 And the reply didn't add to that, your Honor. We've
7 given you declarations that are factual. They're supported,
8 and I think they make it clear that under no circumstances
9 could there be general or specific jurisdiction here in
10 New York.

11 So I would suggest to the Court that much as the Court
12 in R-question did that on that record, your Honor has more than
13 enough evidence, applying the legal standard that needs to be
14 applied here, to deny this motion.

15 THE COURT: Okay. Thank you.

16 MR. DASSOFF: Thank you, your Honor.

17 THE COURT: Shinhan?

18 MR. TRACHTENBERG: Good morning again, your Honor.

19 THE COURT: Good morning. Good to see you.

20 MR. TRACHTENBERG: Thank you.

21 So I ask myself, how much does this Court need to hear
22 about the balancing test in order to --

23 THE COURT: The answer is I'm inclined to not compel
24 compliance with the subpoena, but I don't mean to cut you off.

25 MR. TRACHTENBERG: Well, your Honor, needless to say,

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1 that will allow me to be much briefer than I might be. I'll
2 simply point out a few points very quickly in the effort to
3 solidify your inclination.

4 THE COURT: In the hope that I don't change my mind
5 from the time you start to speak and the time you finish?

6 MR. TRACHTENBERG: That's always a risk.

7 So I will simply point out that your Honor properly
8 observed that *Gucci* itself, Du Pont's leading case, makes it
9 clear that the factors that are -- balancing of the factors
10 supports the denial of the motion.

11 And in particular I would like to just emphasize one
12 point, which is that the fourth factor provides expressly,
13 according to Du Pont, that if the information sought can easily
14 be obtained elsewhere, there is little or no reason to require
15 a party to violate foreign law. And I would simply observe
16 that this is no small matter.

17 What Du Pont is asking the Court to do is to require a
18 nonparty, nonparties to this proceeding, to violate the law of
19 their home country. And there's no allegation that these banks
20 have engaged in any wrongdoing, but Du Pont apparently
21 considers it not a big stretch for an American court to tell a
22 party to go and break the law. And that should only be done
23 under emergency circumstances. And for all of the reasons your
24 Honor has noted, that's not the case here.

25 There are ample other alternatives. And the Court has

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1 pointed to one this morning, when it observed that there's a
2 very simple solution for Du Pont, which is that it could ask
3 the Virginia court to expressly require that copies of the
4 Shinhan Bank statements and other bank bank statements be
5 produced, together with whatever other information is being
6 produced.

7 *Gucci* makes it clear that --

8 THE COURT: Kolon suggested to me that many of those
9 statements have been required to be produced already. I can't
10 tell from what the lawyers have told me what the detail is in
11 terms of actual bank records that have been produced in
12 Virginia.

13 MR. TRACHTENBERG: Nor do I know whether those records
14 have been produced. But if they haven't been, Kolon certainly
15 can be ordered to provide them. So *Gucci* goes with us on that
16 fourth factor.

17 *Gucci* also tells us that the importance of the
18 documents of a particular litigation is vital. The documents
19 have to be vital to the litigation before a nonparty can be
20 ordered to violate foreign law.

21 Here, as we've indicated in our brief, Du Pont has
22 told the Court that Kolon has billions of dollars available in
23 Korea. And as your Honor observed the last time we were here,
24 we're talking about \$3.5 million or thereabouts that may be
25 located at the Shinhan banks. And you already determined that

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1 there's no likelihood of success on the turnover motion. So
2 the records are only potentially necessary if you change your
3 mind on that score, or if Du Pont goes to Korea to seek
4 enforcement. And we know from the declaration of Judge Cho
5 that has been submitted that there are proceeds in Korea that
6 are available, and that they include a preattachment freeze to
7 reserve the status quo.

8 THE COURT: Okay.

9 MR. TRACHTENBERG: And your Honor has already
10 considered the hardship issue and come down in favor of the
11 banks on that. So we respectfully request that you not change
12 your mind and that you deny this motion.

13 THE COURT: Okay. I'm prepared to decide the motions,
14 but let me first do the attorney admissions. So the parties in
15 Du Pont are welcome to remain seated at the counsel table or
16 take a break. This usually takes about a half an hour, maybe
17 less. So you're welcome to sit there, take a break, relax.

18 MR. KIM: We'll come back in half an hour, if that's
19 okay with the Court.

20 THE COURT: Better make it 20 minutes.

21 (Recess)

22 THE COURT: Okay. Du Pont. I'm prepared to decide.

23 The plaintiff, E.I. Du Pont de Nemours & Company,
24 brings three motions in this judgment enforcement action.
25 First, the plaintiff moves for a turnover order against

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1 judgment debtor Kolon Industries, Inc. and Kolon Corp
2 (collectively "Kolon") pursuant to Federal Rule of Civil
3 Procedure 69(a)(1) and New York Civil Practice Law and Rules,
4 ("CPLR") Section 5225(a).

5 Second, the plaintiff moves for an order requiring
6 Kolon to preserve the status quo with respect to assets held at
7 certain banks and compelling Kolon to give its written consent
8 for the banks to comply with subpoena seeking discovery.

9 Third, the plaintiff moves to compel discovery from
10 garnishees Shinhan Bank and Shinhan Financial Group Co.,
11 Limited (collectively "Shinhan") pursuant to subpoenas issued
12 pursuant to Rule 45 of the Federal Rules of Civil Procedure.

13 The current dispute arises from a civil action brought
14 by the plaintiff against Kolon Industries, Inc. in the Eastern
15 District of Virginia alleging misappropriation of trade secrets
16 and other related causes of action. Following a jury verdict
17 in Du Pont's favor, the United States District Court for the
18 Eastern District of Virginia entered a judgment in favor of
19 Du Pont against Kolon in the amount of \$919.9 million in
20 compensatory damages and \$350,000 in punitive damages.

21 On April 10, 2012, that Court granted Du Pont's motion
22 for permission to register the judgment elsewhere pursuant to
23 28 U.S.C. Section 1963. And on April 13, 2012, Du Pont
24 registered the judgment in this court.

25 The plaintiff now seeks to enforce its judgment

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1 against Kolon. Kolon Industries, Inc. is a global company
2 based in South Korea that manufactures and markets various
3 industrial materials. The plaintiff asserts that, following a
4 corporate restructuring, Kolon Industries, Inc. is also known
5 as Kolon Corp. or Kolon Corporation. The plaintiff thus brings
6 the present motions against both entities, and Kolon has not
7 sought to draw a distinction among those corporate entities for
8 purposes of the pending motion.

9 The plaintiff previously brought two motions directed
10 against garnishee Shinhan: A motion for a turnover order
11 pursuant to CPLR Section 5225(b) and a motion for a preliminary
12 injunction ordering Shinhan to restrain Kolon's assets.

13 On June 1, 2012, this Court, sitting as Part I, denied
14 the plaintiff's preliminary injunction motion and stayed the
15 plaintiff's turnover motion against Shinhan pending the
16 resolution of the present turnover motion against Kolon.

17 The plaintiff first moves for a turnover order against
18 Kolon. Under Rule 69(a)(1) a federal district court has the
19 authority to enforce a judgment by attaching property in
20 accordance with the law of the state in which the district
21 court sits. *Koehler v. Bank of Bermuda, Ltd.* ("Koehler I"),
22 544 F.3d 78, 85 (2d Cir. 2008). CPLR Section 5225(a) provides
23 that, quote, "where it is shown that the judgment debtor is in
24 possession or custody of money or other personal property in
25 which he has an interest, the Court shall order that the

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1 judgment debtor pay the money or so much of it as is sufficient
2 to satisfy the judgment to the judgment creditor." New York
3 CPLR Section 5225(a).

4 The defendant first argues that the plaintiff failed
5 to serve the turnover motion papers on Kolon in compliance with
6 the requirements of the Hague Convention on the Service Abroad
7 of Judicial and Extrajudicial Documents and Civil or Commercial
8 Matters ("the Hague Convention"). However, in connection with
9 the underlying action in the Eastern District of Virginia,
10 Kolon agreed to waive Hague Convention service and stipulated
11 that its counsel would accept service on its behalf.

12 Stipulated Order for Extension of Time, *E.I. Du Pont de Nemours*
13 *& Co. v. Kolon Industries, Inc.*, No. 09 Civ 58 (E.D. Va.
14 February 26, 2009), ECF No. 4.

15 Because this judgment enforcement proceeding is simply
16 a continuation of the underlying action in the Eastern District
17 of Virginia, this waiver of service should remain effective.
18 Moreover, because a turnover proceeding against the judgment
19 debtor under CPLR Section 5225(a), unlike a turnover proceeding
20 against a garnishee under CPLR Section 5225(b), can be
21 initiated by motion and does not require commencement of a new
22 proceeding -- see *Wasserman Media Group, LLC v. Bender*, 10 Civ
23 8783, 2012 WL 1506181 at 2, (S.D.N.Y. April 26, 2012) -- the
24 Hague Convention's service requirements should not apply here
25 in any event. See *SEC v. Credit Bankcorp, Ltd*, No. 99 Civ.

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1 11395, 2011 WL 666158, at 4 (S.D.N.Y. February 14, 2011
2 (concluding that the Hague Convention "only applies to the
3 initial service of process, namely the summons, not subsequent
4 judicial documents" and concluding that service of subsequent
5 documents need only comply with the Federal Rule of Civil
6 Procedure 5) (citing *Volkswagenwerk Aktiengesellschaft v.*
7 *Schlunk*, 486 U.S. 694, 700 (1988) (finding that the drafting
8 history of the Hague Convention "supports our view that Article
9 I of the convention refers to service of process in the
10 technical sense")); see also *S&S Machine Corp v. Wuhan Heavy*
11 *Duty Machinery Tool Group Co., Ltd.*, No. 07 Civ. 4909, 2012 WL
12 958528 at 6 n.11 (E.D.N.Y. January 13, 2012) (same), report and
13 recommendation adopted in part, 2012 WL 958527 (E.D.N.Y.
14 March 21, 2012).

15 In this case the plaintiff served the documents
16 relating to the present turnover motion by e-mailing them to
17 the defendant's attorney and by sending them via express mail
18 and registered mail, return receipt requested, to Kolon's
19 headquarters in Korea. (Kim Reply Declaration, paragraph 5.)
20 The defendant does not contend that the service was defective
21 under Federal Rule of Civil Procedure 5 or otherwise defective
22 apart from the Hague Convention requirements that the defendant
23 has already waived. Thus, there is no basis to conclude that
24 service of the present turnover motion was defective.

25 The defendant next argues that the Court lacks

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1 personal jurisdiction over Kolon in order to issue a turnover
2 order against Kolon pursuant to CPLR Section 5225(a). This
3 Court must have personal jurisdiction over Kolon. See, for
4 example, *SEC v. Softpoint, Inc.*, No. 95 Civ. 2951, 2012 WL
5 1681167, at 2 to 3 (S.D.N.Y. May 9, 2012.)

6 In a federal question case involving an out-of-state
7 defendant, the district court applies the forum state's
8 personal jurisdiction rules if the federal statute does not
9 specifically provide for national service of process. *PDK*
10 *Labs v. Friedlander*, 103 F.3d 1105, 1108 (2d Cir. 1997).

11 Here, the statute pursuant to which the judgment is
12 rendered -- 28 U.S.C. Section 1963 -- does not provide for a
13 nationwide service of process; thus, the Court must determine
14 whether New York law allows the exercise of personal
15 jurisdiction, and if so, whether the exercise of such
16 jurisdiction comports with the constitutional due process
17 guarantees. See *Estate of Unger v. Palestinian Authority*, 400
18 F. Supp. 2d 541, 547 (S.D.N.Y. 2005) (concluding that when
19 enforcing a judgment registered pursuant to 28 U.S.C. Section
20 1963, the appropriate measure of personal jurisdiction is the
21 forum state's long-arm statute).

22 The plaintiff first contends that Kolon submitted to
23 this Court's personal jurisdiction by appearing in the prior
24 turnover proceeding against garnishee Shinhan. The plaintiff
25 argues that Kolon's appearance in the Shinhan turnover

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1 proceeding was functionally equivalent to an intervention which
2 it contends is fundamentally incompatible with an objection to
3 personal jurisdiction. However, under New York law a
4 non-domiciliary judgment debtor "may protect his interest in
5 attached property without submitting to false in personam
6 jurisdiction." *In Re Gaming Lottery Securities Litigation*, No.
7 96 Civ 5567, 2000 WL 1801840, at 4, (S.D.N.Y. December 7,
8 2000.) Section 320(c) of CPLR provides for limited appearances
9 for defendants contesting levies on their property. Thus,
10 Section 320 sanctions the use of a limited appearance and
11 permits the defendant in a quasi in rem action, such as a
12 garnishment proceeding, to answer and to protect his interest
13 in the attached property without submitting to full in personam
14 jurisdiction and risking a personal judgment. *Cargill, Inc. v.*
15 *Sabine Trading and Shipping Co., Inc.*, 756 F.2d 224, 228 (2d
16 Cir. 1985); see also *Gager v. White*, 425 N.E.2d 851, 856, n.10,
17 (N.Y. 1981) (in a quasi in rem action, "the defendant is
18 permitted to defend without submitting to in personam
19 jurisdiction"); *Weininger v. Castro*, 462 F. Supp. 2d 457, 492
20 (S.D.N.Y. 2006) (characterizing garnishment proceedings as
21 quasi in rem actions.) Thus, by entering a special appearance
22 to oppose the Shinhan turnover motion, Kolon did not submit to
23 the personal jurisdiction of this Court. See *In re Gaming*
24 *Securities Litigation*, 2000 WL 1801840 at 2 and 4 to 5
25 (defendant who opposed turnover proceeding against third-party

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1 garnishee under CPLR Section 5225 did not submit to court's
2 personal jurisdiction). Indeed, the plaintiff did not return
3 to this argument in its reply brief.

4 The plaintiff next contends that Kolon has sufficient
5 contacts with New York so as to render this Court's
6 jurisdiction proper. The defendant contends that no such
7 context exists, asserting that both Kolon Industries, Inc. and
8 Kolon Corp. are foreign corporations based in South Korea, and
9 that neither entity has offices, employees, bank accounts or
10 assets in New York. (Jung declaration, paragraphs 10 and 12.)
11 The plaintiff asserts that this Court has general jurisdiction
12 over Kolon under an agency theory, because Kolon is present and
13 doing business in New York by virtue of the activities of its
14 subsidiaries Kolon USA and Kolon I'Networks. However, the
15 parties strenuously dispute the extent to which these
16 subsidiaries actually conduct business in New York, as well as
17 the extent to which they carry out the business of and perform
18 functions for Kolon.

19 The papers and supporting affidavits submitted by the
20 plaintiff do not establish that these subsidiaries do "all the
21 business which Kolon could do were it here by its own
22 officials," which would be required to conclude that the
23 alleged agents subjected Kolon to general personal jurisdiction
24 in New York. *Frummer v. Hilton Hotels International, Inc.*, 227
25 N.E.2d 851, 854 (N.Y. 1967).

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1 The plaintiff has also failed to make a sufficient
2 showing that the Court has jurisdiction over Kolon based on
3 Kolon's own activities. The plaintiff contends that Kolon
4 itself conducts sufficient business in New York to subject it
5 to general jurisdiction, but the papers and supporting
6 affidavits submitted by the plaintiff do not make clear whether
7 the specific entities with which Kolon conducts business are,
8 in fact, based in New York or elsewhere. See Kim declaration,
9 paragraph 28, and Exhibit 10; Jung declaration, paragraphs 13
10 and 15. It is also unclear from the papers submitted whether
11 any of the tortious conduct that gave rise to the underlying
12 judgment in the Eastern District of Virginia occurred in
13 New York, such that specific jurisdiction would be proper under
14 CPLR Section 302(a)(2).

15 The plaintiff has thus made an insufficient showing of
16 personal jurisdiction over Kolon to permit the Court to grant
17 the relief sought. However, it is appropriate to authorize
18 jurisdictional discovery to determine the nature and scope of
19 Kolon's contacts with New York, if any, and to resolve the
20 disputed factual issues set forth above. See *Daval Steel*
21 *Products v. M.V. Jurac Dalmatinac*, 718 F.Supp. 159, 162
22 (S.D.N.Y. 1999) (jurisdictional discovery appropriate where
23 plaintiff makes a "threshold showing that there is some basis
24 for the assertion of jurisdiction").

25 Accordingly, the Court will permit the parties to

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1 engage in jurisdictional discovery for a period of 60 days, and
2 another conference will be scheduled after the conclusion of
3 jurisdictional discovery. The plaintiff's motion for a
4 turnover order is, therefore, denied without prejudice to
5 renewal after the conclusion of the jurisdictional discovery.
6 The plaintiff's turnover motion in Shinhan will remain stayed
7 during this time for jurisdictional discovery.

8 The plaintiff next moves for an order requiring Kolon
9 to preserve the status quo with respect to assets held at
10 certain banks and compelling Kolon to give its written consent
11 for the banks and comply with subpoenas. This motion is also
12 denied without prejudice to renewal after the conclusion of
13 jurisdictional discovery because there is an insufficient
14 showing that the Court has personal jurisdiction to enter this
15 relief against Kolon.

16 The plaintiff next moves for an order compelling
17 Shinhan to comply with Rule 45 subpoenas seeking documents
18 concerning Kolon's accounts at Shinhan Bank. Shinhan asserts
19 that if it complied with the Rule 45 subpoenas, it would be in
20 violation of Korean law, namely, The Act on Real Name Financial
21 Transactions and Guarantee of Secrecy ("the Real Name Act"),
22 which provides, with certain exceptions, that an employee of a
23 financial institution may not disclose any material or
24 information relating to the contents of a financial transaction
25 without the written consent of the parties to the transaction.

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(Cho declaration, paragraph 13.)

Where a party from whom discovery is sought asserts that foreign law constitutes a bar to production, courts perform an international comity analysis to determine whether to exercise their power to compel discovery. In conducting this analysis, courts in this Circuit consider a series of factors set forth in the Restatement (Third) of Foreign Relations Law of the United States. See, for example, *Gucci America Inc. v. Curveal Fashion*, No. 09 Civ. 8458, 2010 WL 808639 at 2 (S.D.N.Y. March 8, 2010); *Linde v. Arab Bank, PLC*, 262 F.R.D. 136, 149 (E.D.N.Y. 2009).

These factors are: "One, the importance of the investigation or litigation of the documents or other information requested; two, the degree of specificity of the request; three, whether the information originated in the United States; four, the availability of alternative means of securing information; and five, the extent to which noncompliance with the request would undermine important interests of the United States, or compliance with the requests would undermine important interests of the state where the information is located." Restatement (Third) Foreign Relations Law, Section 442(1)(c).

Courts in this circuit also consider "the hardship of compliance on the party or witness from whom discovery is sought and the good faith of the party resisting discovery."

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1 *Gucci*, 2010 WL 808639 at 2 (quoting *Minpeco S.A. v.*
2 *Conticommodity Services, Inc.*, 116 F.R.D. 517, 523 (S.D.N.Y.
3 1987)).

4 Here the balance of these factors weighs heavily
5 against compelling Shinhan to produce the discovery sought by
6 the plaintiff.

7 First, the parties appear to agree that the documents
8 originated outside the United States and are maintained in
9 Korea, which weighs in favor of Shinhan.

10 Second, with respect to the competing interests of the
11 United States and Korea, while the United States has an
12 interest in enforcement of subpoenas, this interest is
13 diminished to some extent when, as here, the discovery is
14 requested by private civil litigant and is sought from a third
15 party. See *Gucci*, 2010 WL 808639 at 5; *Tiffany (NJ) LLC v. Qi*
16 *Andrew*, 276 F.R.D. 143, 157 (S.D.N.Y. 2011).

17 Next, with respect to the hardship of compliance,
18 Shinhan has made a showing that it could face civil and
19 criminal penalties in Korea if it produces the documents
20 requested by the plaintiff. Shinhan submits a declaration from
21 a Korean lawyer and former chief judge of the Seoul District
22 Court, who represents that unauthorized disclosures in
23 violation of the Real Name Act are punishable by imprisonment
24 for a term of up to five years and fines in amounts of up to 30
25 million Korean Won or both. (Cho Declaration, paragraph 13.)

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1 It is true, as the plaintiff asserts, that some courts
2 have deemed the possibility of hardship to be speculative,
3 whereas here the party resisting disclosure does not cite
4 instances where the sanctions at issue have actually been
5 imposed in practice. See, for example, *Milliken and Co. v.*
6 *Bank of China*, 758 F.Supp. 2d 238, 250 (S.D.N.Y. 2010); *Gucci*,
7 2010 WL 808639 at 7. However, this is not a case where there
8 is countervailing evidence that the statute in question was
9 never intended to be enforced in practice. See *In re Air Cargo*
10 *Shipping Services Antitrust Litigation*, 278 F.R.D. 51, 53 to 54
11 (E.D.N.Y. 2010), or that banks have actually complied with the
12 United States court order compelling production without
13 negative consequences. See *Tiffany*, 276 F.R.D. at 159.

14 Instead, this is simply a case where the plaintiff's
15 Korean law expert is not aware of a case on point where
16 prosecution under the Real Name Act has or has not occurred.
17 (Jang declaration, paragraph 4.) Nor is this a case where
18 there are likely to be valid defenses on which Shinhan could
19 prevail if the Real Name Act were enforced against it. See
20 *Weiss v. National Westminster Bank, PLC*, 2 F.R.D. 33, 56
21 (E.D.N.Y. 2007).

22 Although the plaintiff points out that the Real Name
23 Act has an exception for disclosure pursuant to court orders,
24 Judge Cho asserts that a Korean court is unlikely to recognize
25 an order from a New York court as valid for the purposes of

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1 this exception, and the plaintiff has not rebutted the showing.
2 (Cho declaration, paragraph 13.) In addition, Shinhan's
3 "status as a nonparty in this litigation weighs against issuing
4 an order because an order compelling production should be
5 imposed on a nonparty, quote, only in extreme circumstances."
6 *Linde*, 262 F.R.D. at 151 (quoting *Minpeco*, 118 F.R.D. 331, 332.
7 See also *Tiffany*, 276 F.R.D. at 158. Thus, on balance, the
8 hardship of compliance weighs in favor of Shinhan. Moreover,
9 there is no showing that Shinhan has acted with bad faith in
10 this matter, which also weighs in Shinhan's favor.

11 Furthermore, there are several alternative means of
12 obtaining the information sought by the plaintiff. First, the
13 plaintiff could obtain this information directly from Kolon.
14 It could obtain discovery directly from Kolon in the Eastern
15 District of Virginia. Indeed, Kolon asserts that during the
16 course of discovery it has provided the plaintiff with specific
17 account numbers, deposit balances and the physical addresses of
18 each branch of the Shinhan Bank holding Kolon's property.
19 (Chung declaration, paragraphs 8 to 10.) The plaintiff does
20 not appear to argue that Kolon has refused to comply with the
21 specific requests for information concerning Kolon's accounts
22 at Shinhan. The plaintiff also has resorted to the Court in
23 the Eastern District of Virginia if it found the information
24 provided by Kolon relating to Shinhan were insufficient.

25 Second, the plaintiff could proceed directly in Korea,

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1 given that Korean law allows judgment creditors to seek
2 preliminary attachment of freezes against a judgment debtor's
3 accounts even before a judgment becomes final and
4 non-appealable. (Cho declaration, paragraph 11.) The
5 plaintiff has made no showing of why these alternative methods
6 would be futile or unduly difficult, and these methods have the
7 benefit of avoiding the imposition of hardships on Shinhan, an
8 innocent third party. Thus, this factor also weighs against
9 compelling Shinhan to comply with the subpoenas.

10 Furthermore, the documents requested are not vital or
11 of great importance to this judgment enforcement action, given
12 Kolon's representations that it has already provided
13 information about its accounts at Shinhan to the plaintiff.

14 Further, as Shinhan points out, Kolon is not a
15 fly-by-night defendant against whom a default judgment has been
16 entered but has instead been litigating this case actively in
17 the Eastern District of Virginia, where it is indisputably
18 subject to personal jurisdiction. Thus, this is not a case
19 where the plaintiff's only tool for enforcing the judgment is
20 to access the defendant's bank accounts. See *Gucci*, 2010 WL
21 808639 at 3.

22 Moreover, the amounts in Kolon's Shinhan accounts are
23 relatively small compared to the amount of the judgment and the
24 other assets of Kolon potentially available to the plaintiff.
25 Kolon has informed the plaintiff that it holds approximately

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1 \$71.3 million in deposits in various bank accounts in Korea,
2 yet it holds only \$3.5 million in its accounts at Shinhan Bank.

3 Moreover, the 3.5 million is a small fraction of the
4 judgment sought to be enforced, which is in excess of \$920
5 million. And it is a very small fraction of the defendants'
6 revenue and worth. This weighs against a conclusion that
7 documents relating specifically to Kolon's assets at Shinhan
8 Bank are vital to the plaintiff's ability to enforce a nearly
9 \$1 billion judgment.

10 The remaining factor, the specificity of the
11 plaintiff's request, weighs in favor of the plaintiff because
12 the requests are reasonably specific. However, on balance, the
13 relevant factors in the comity analysis weigh strongly against
14 ordering Shinhan to comply with the subpoenas at issue here.
15 Accordingly, the plaintiff's motion to compel discovery from
16 Shinhan is denied.

17 The Court has considered all of the arguments of the
18 parties. To the extent not specifically addressed above, the
19 remaining arguments are either moot or without merit. For the
20 foregoing reasons, the plaintiff's motion for a turnover order
21 against Kolon and the plaintiff's motion for an order
22 preserving the status quo are denied without prejudice to
23 renewal after the conclusion of jurisdictional discovery. The
24 plaintiff's motion to compel discovery from Shinhan is denied.
25 The Court authorizes jurisdictional discovery for 60 days. The

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1 clerk is directed to close docket numbers 51 and 55.

2 So ordered.

3 All right. That disposes of all of the motions before
4 me. Good morning, all.

5 MR. KIM: Thank you for your time, Judge.

6 MR. DASSOFF: Your Honor, the Court in its order had
7 mentioned a conference, and I wondered, is that conference one
8 that you want to set a date for or would it be before this
9 Court?

10 THE COURT: That's a very good question. I
11 deliberately left out a date for that conference. The parties
12 should contact the Court and ask for a conference. Whether the
13 subsequent proceeding should be before me or before the next
14 Part I judge is something that I'm just not clear about, which
15 is why I didn't give you a specific date and say, come on down,
16 come on down before me. It's a matter I want to think about.

17 So you should contact the Court, and whether that
18 comes back to me or the next Part I judge, whoever the Part I
19 judge is in two months, is an issue to be decided.

20 MR. DASSOFF: Understood, your Honor. Thank you.

21 MR. KIM: Thank you, Judge.

22 MR. TRACHTENBERG: Thank you, your Honor.

23 (Adjourned)
24
25